STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Markey, Whitbeck and Gleicher

In the Matter of JADEN TAYLOR LEE

Supreme Court No. 137653
Court of Appeals No. 283038
Circuit Court No. 00-005132-NA

A Minor.
_____/

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Appellee,

v

CHERYL LYNN LEE,
Respondent-Appellant,

and

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Intervening Respondent-Appellee.

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BRIEF OF ATTORNEY GENERAL AS *AMICUS CURIAE*

ORAL ARGUMENT REQUESTED

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II. **ICWA §1912(f) requires that a termination of parental rights to be based on evidence establishing beyond a reasonable doubt that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. DHS presented evidence from a qualified Indian welfare expert, as well as case workers, showing that allowing Cheryl Lee to gain custody of Jaden Lee would cause the child serious emotional or physical damage and would not be in his best interest. Is this evidence sufficient to meet the beyond a reasonable doubt standard if it is not contemporaneous to the termination proceeding?**

JURISDICTIONAL STATEMENT

The Attorney General agrees with Appellant's Statement of Jurisdiction.

INTEREST OF THE *AMICUS CURIAE*

This Court invited the Attorney General to file a brief as *amicus curiae*.[1] The Attorney General is authorized to intervene and appear before this Court on behalf of the State of Michigan or whenever the people of this State may have an interest.[2] This case involves the termination of parental rights to a minor where the parent and the child are members of a recognized Indian tribe. The people of this State have a significant interest in child welfare issues.

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[1] MCR 7.306(D)(2) allows the Attorney General to file such a brief without a motion.
[2] MCL 14.28.

STATEMENT OF PROCEEDINGS AND FACTS

The Attorney General incorporates by reference the "Basic Facts and Procedural History," as set forth in the Court of Appeals' Opinion.[3] On December 18, 2008, this Court granted the application for leave to appeal the October 16, 2008 judgment of the Court of Appeals, directing the parties to brief two issues:

> The parties shall include among the issues to be briefed (1) whether the term "active efforts" in 25 USC 1912(d) requires a showing that there have been recent rehabilitative efforts designed to prevent the breakup of that particular Indian family; and (2) whether the "beyond a reasonable doubt" standard of 25 USC 1912(f) requires contemporaneous evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated.

The Court also invited the Attorney General to file an *amicus curiae* brief by February 24, 2009.

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[3] *Department of Human Services v Lee and Sault Ste Marie Tribe of Chippewa Indians*, Court of Appeals No 283038 (10/16/08)(hereafter "*Lee*"), slip op at 1-5.

INTRODUCTION

The Attorney General asks that this Court follow the lead taken by numerous sister States in determining that, under § 1912(d) of the Indian Child Welfare Act, the term "active efforts" does not require the State to continue remedial and rehabilitative services long after it is clear that those efforts would be futile. The Court of Appeals thorough and well-reasoned opinion should be affirmed.

In this case, the Michigan Department of Human Services and the Sault Ste. Marie Tribe of Chippewa Indians provided Cheryl Lee with combined services for over six years. Every social service worker that provided services to her, from both DHS and the Tribe, indicated that these services were unsuccessful in trying to improve Cheryl Lee's parenting skills necessary to avoid the breakup of this Indian family. These same workers indicated that Cheryl Lee was not capable of being a full-time parent to Jaden Lee and that it was not in Jaden Lee's best interest to be reunited with Cheryl Lee. Additionally, the Tribe presented testimony from the only Indian welfare expert called to testify at the hearing. That expert clearly and unequivocally indicated that, from the Tribe's perspective, active and reasonable efforts to prevent the breakup of the family had been provided. Based on a thorough knowledge about Cheryl Lee's lack of progress with services provided, the expert testified that it was likely that Jaden Lee would suffer serious emotional or physical damage should Cheryl Lee gain custody of him. Cheryl Lee provided no Indian welfare expert to contradict this finding. The Attorney General, as *Amicus Curiae*, urges this Court to follow the holdings in other States that do not require continued "active efforts" when such efforts would be futile.

In addition, no other state has determined that the "beyond a responsible doubt" standard of § 1912(f) requires "contemporaneous" evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in emotional or physical damage to the child

before the termination of parental rights can take place. The plain language of ICWA does not limit such a determination to only contemporaneous evidence. Moreover, the sole Indian welfare expert to testify in this case did not believe contemporaneous evidence was required. Rather, a qualified Indian welfare expert must testify that Jaden Lee would suffer serious emotional or physical damage if the Court allowed Cheryl Lee to regain custody of him. This testimony would be based on the long history of parental neglect and failed services. In fact, this is precisely what the Indian welfare expert opined in this case, thus meeting ICWA requirements. It's hard to understand how this evidence does not meet the standard of "beyond a reasonable doubt," particularly when no Indian welfare expert testified to the contrary.

If this Honorable Court were to determine that § 1912(f) includes a "contemporaneous" component, such a requirement would place an undue hardship on the agencies already burdened with scarce resources, time and manpower. These limited resources could be better used for Indian children and families that have a real chance at reunification. In fact, such a requirement could realistically cause the Michigan Department of Human Services and Indian Tribes to continue providing services that are clearly futile right up to the termination proceeding. Each ICWA case should be adjudicated on a case by case basis to ascertain if the "active efforts" are indeed futile. There should not be a blanket policy in Michigan that forces an already overburdened social welfare system to provide additional services that past experience has shown will be futile and unsuccessful.

ARGUMENT

I. In 25 USC §1912(d), the Indian Child Welfare Act (ICWA) requires that "active efforts" be made to prevent the breakup of an Indian family. The Department of Human Services (DHS) presented overwhelming evidence that established Cheryl Lee's inability to improve her parenting skills or address her problems despite being offered six years of services. The Courts below found that additional efforts to rehabilitate Cheryl Lee would have been futile. This showing satisfied the "active efforts" requirement.

A. Standard of Review

Statutory interpretation is a question of law that is subject to *de novo* review on appeal.[4] To ascertain and effectuate what Congress meant by the term "active efforts," each word or phrase of the statute must be given its commonly accepted meaning.[5] Courts presume that Congress only intended to include the words and meaning it plainly expressed in § 1912(d).[6] In interpreting "active efforts," this Court must ascertain and give effect to the intent of Congress in enacting the ICWA, which is to protect the Indian child's best interest and promote stability within the Indian family and tribe.[7] This Court must consider the language Congress included without reading anything into § 1912(d) that is not within the manifest intent of Congress.[8]

In a child protective order of disposition, Michigan law requires that "the order shall state whether reasonable efforts have been made to prevent the child's removal from his of her home or to rectify the conditions that caused the child's removal from his or her home."[9] The Legislature did not define "reasonable efforts," but left it to the trial court to determine what is

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[4] *Dep't of Transportation v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).
[5] *Frenchtown Villa v Meadors,* 117 Mich App 683, 687; 324 NW2d 133 (1982); *Western Michigan Univ Bd of Control v Michigan,* 455 Mich 531, 539; 565 NW2d 828 (1997).
[6] *Nation v WDE Electric Co,* 454 Mich 489, 494; 563 NW2d 233 (1997).
[7] *Frankenmuth Mut Ins v Marlett Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998); 25 USC §1902.
[8] *House Speaker v State Administrative Board,* 441 Mich 547, 567; 495 NW2d 539 (1993); *Colbert v Conybeare Law Office*, 239 Mich App 608, 616; 609 NW2d 208 (2000); *In re SR*, 229 Mich App 310, 314; 581 NW2d 291 (1998).
[9] MCL 712A.18f(4), MCR 3.973(F)(3).

"reasonable" in each case. The trial court normally makes this "reasonable efforts" finding in its initial dispositional order.[10]

B. **Analysis**

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) after concluding that (1) it "has plenary power over Indian affairs;" (2) it "has assumed the responsibility for the protection and preservation of Indian tribes and their resources;" and (3) "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[11] Congress had a particular concern with the disproportionately higher rates of parental terminations with Indian families caused by insensitivity to "Indian cultural values and social norm, leading to misevaluations of parenting skills and to unequal considerations of such matters as parental alcohol abuse."[12]

The Indian Child Welfare Act is intended to protect an Indian child's best interest and promote stability within the Indian family and tribe, to place the child in foster care or terminate parental rights to the child.[13] The State must implement ICWA, which governs the jurisdiction, placement, termination of parental rights, and adoption of Indian children.[14] ICWA has requirements that must be met by the state when a case involves an Indian child. These requirements include notice to the Indian tribes, active efforts to provide rehabilitative services, standards for foster care placement, termination of parental rights and adoption of Indian Children. The State must prove that it made "active efforts" to provide remedial or rehabilitative

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[10] *See*, Adoption and Safe Families Act, 42 USC 671(a)(15).
[11] 25 USC § 1901 (1978).
[12] *See American Indian Law Deskbook*, p 463 (3rd ed 2004) (quoting from HR REP NO 95-1386, at 10 (1978), reprinted in 1978 USCCAN 7530, 7532). *See also* 25 USC § 1901(4)(1978).
[13] 25 USC 1901 *et seq*.
[14] 25 USC § 1902.

services to preserve or reunite the family and that the services were unsuccessful. Congress did not define "active efforts" under § 1912(d) of the ICWA, but left it to the State courts to determine on a case-by-case basis. ICWA § 1912(d) specifically provides[15]:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

To meet the active efforts requirement, the State must take affirmative steps to engage the Indian family in the provision of remedial and rehabilitative services to avoid the breakup of the family. As an Alaska court described it, "Active efforts occur 'where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own.' The determination of active efforts is done on a case-by-case basis."[16]

Many States have concluded that "active efforts" require a greater showing than reasonable efforts. But these States also recognize that the trial court should have flexibility in making the determination[17]:

> Although we hold that active efforts require more than reasonable efforts, we also acknowledge that the determination of whether this standard has been met should be made on a case-by-case basis. ... **Accordingly, the trial court is afforded some discretion on this issue.**

In this appeal, the mother Cheryl Lee argues that the lower court erred in terminating her parental rights to her son Jaden Lee because the State failed to make "current active efforts" to

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[15] 25 UCS § 1912(d).

[16] *N.A. v State*, 19 P3d 597, 602-603 (Alaska SCt 2001)

[17] *State ex rel CD v State*, 2008 UT App 477; 2008 Utah App. LEXIS 478 (12/26/08), at p35 (citation omitted; emphasis added). At least two states' courts have also held that ICWA's term "active efforts" is coextensive with the term "reasonable efforts" used in Michigan law and in the Adoption and Safe Families Act, 42 USC 671(a)(15). *See, e.g., In re Michael G*, 63 Cal App. 4th 700, 74 Cal Rptr 2d 642, 650 (Cal Ct App 1998); *In re K.D.*, 155 P.3d 634, 637 (Colo Ct App. 2007), *cert denied*, 2007 Colo Lexis 249 (Colo Mar 26, 2007), cited in *State ex rel CD v State*, 2008 UT App 477; 2008 Utah App LEXIS 478 (12/26/08), at p 33.

provide remedial and rehabilitative services as required under § 1912(d) of the ICWA. Ms. Lee acknowledges that the word "current" is nowhere to be found in § 1912(d). And she agrees that Congress did not define what constitutes "active efforts." As a recent Utah decision explained[18]:

> That section unambiguously requires the State to demonstrate that "active efforts have been made . . . to prevent the breakup of the Indian family," but it is silent as to how recent those efforts must be or to whom they must have been directed.

The Court of Appeals in *In re Roe* reasoned that "there is no precise formula for determining what constitutes sufficient 'active efforts.'"[19] The *Roe* panel stated[20]:

> Subsection 1912(d) of the ICWA clearly places the burden on the party seeking termination to satisfy the trial court that active efforts to provide the required services have been made and that they were unsuccessful. **But the statute does not provide guidance concerning the nature or extent of the active efforts necessary to satisfy the requirement or the timing within which those efforts must be made**. The statute merely requires proof that "active efforts have been made to provide remedial services or rehabilitative programs" to prevent the breakup of the Indian family at some point before termination and that the efforts "proved unsuccessful."

The Court of Appeals in this case applied *Roe*'s interpretation of "active efforts."[21] As required under § 1912(d), Congress intended that, where the State seeks to terminate parental rights to an Indian child, it must satisfy the trial court that active efforts were made "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these active efforts have proved unsuccessful."[22]

But Congress is silent with respect to what constitutes active efforts or when those efforts must be made. In this case, the State proved that, for over six years, active efforts had been made to provide remedial and rehabilitative services to Ms. Lee. These services included, but were not limited to, Prevention Services, Child Protection Services and Wraparound Services, all

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[18] *State ex rel CD v State*, 2008 UT App 477; 2008 Utah App. LEXIS 478 (12/26/08), at p 23.
[19] *In re Roe*, 281 Mich App 88, 102; ___ NW2d ___ (2008).
[20] *In re Roe*, 281 Mich App at 101-102. (Emphasis added.)
[21] *Lee*, slip op at 6.
[22] *Lee*, slip op at 6, *citing* 25 USC 1912(d).

of which were unsuccessful in rehabilitating Ms. Lee to the extent that she could properly care for a child. During those six years, her parental rights were terminated to three other children. The Court of Appeals concluded that these facts "clearly and convincingly established that DHS and the tribal agencies made many varied and repeated efforts to provide services to Cheryl Lee in an attempt to keep her united with Jaden Lee."[23]

Although the Court of Appeals does not use the term, these facts appear to support a "reasonable efforts" finding under State law. To determine whether those reasonable efforts were also "active efforts," it is helpful to examine this case in light of the doctrine of anticipatory neglect.[24] Under this doctrine, the trial court may view how a parent treats one child as probative of how that parent may treat other children. Michigan cases have often applied this doctrine to terminations of parental rights.[25] And in fact, the doctrine has been codified in MCL 712A.19b(3)(i), the ground of termination under which the lower court terminated Cheryl Lee's parental rights to Jaden Lee.[26] This termination ground applies equally to an Indian child where the court must determine if the State made "active efforts" to preserve the family, as it does to a non-Indian child where the State must made "reasonable efforts" to preserve the family. Accordingly, to meet the requirement of § 1912(d), the trial court may terminate parental rights to a child based on a parent's treatment of other children. Applying this reasoning here, when it has already been shown by clear and convincing evidence that prior efforts to rehabilitate and reunify the parent with other children have proven unsuccessful, the trial court should not

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[23] *Lee*, slip op at 9.

[24] The Attorney General recognizes that the Court of Appeals' dissent concludes that the majority misapplied the doctrine, but submits that the doctrine aids this analysis.

[25] *In re LaFlure*, 48 Mich App 377; 210 NW2d 482 (1973); *In re Anderson*, 155 Mich App 615; 155 NW2d 615 (1986); *In re Parshall*, 159 Mich App 683; 406 NW2d 913 (1987).

[26] Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful. MCL 712A.19b(3)(i).

force the State to make futile attempts to provide more remedial services and rehabilitative programs before terminating parental rights.

Additionally, numerous other States have adopted the futility test regarding continued active efforts. In *Letitia V et al, v The Superior Court of Orange County*,[27] the court addressed the meaning of active efforts. That case embodied similar facts to the present case. *Letitia* involved a mother who had a history of remedial and rehabilitative services relating her other children, which culminated in the termination of her parental rights to those children. In fact, the services in *Letitia* were far less extensive, lasting only one year, instead of the six years provided in the present case.[28] Similarly, expert testimony was elicited that placing the child with his mother would risk substantial detriment to the child. The issue before the court was whether active efforts continued to be necessary regarding another child when the previous efforts as to the other children were unsuccessful. The court reasoned that, "while this issue was one of first impression in California, [there was] nothing particularly perplexing about it. ... The law does not require the performance of idle acts."[29]

In *Letitia* the Court noted that the federal statute says nothing about requiring the State to provide duplicative reunification services. It simply requires that active efforts be made to prevent the breakup of Indian families. The phrase "active efforts," construed with common sense and syntax, seems only to require that timely and affirmative steps be taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services designed to remedy problems which might lead to severance of the parent-

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[27] *Letitia V et al, v The Superior Court of Orange County*, 81 Cal App 4th 1009; 97 Cal Rptr 2d 303 (2000).
[28] *Lee*, slip op at 2.
[29] *Letitia*, 97 Cal Rptr 2d at 309.

child relationship.[30] The *Letitia* Court pointedly stated: "This conclusion, which seems rather obvious to us, is consistent with the holdings in sister jurisdictions."[31] The Court concluded its analysis by stating "the only question remaining is whether, in this case, active efforts were made to prevent the breakup of Letitia's family. And that question, as we find ourselves saying without distressing frequency, is not close."[32]

This issue has also been addressed recently in Colorado. In the case of *In the Interest of KD*,[33] the Colorado Court of Appeals held that the court may terminate parental rights without offering additional services when a social services department has expended substantial, but unsuccessful efforts over several years to prevent the breakup of the family, and there is no reason to believe additional treatment would prevent the termination of parental rights. Here again, the *KD* case contains some similar facts to this case. The father suffered from emotional illness that precluded him from adequately taking care of his son. The State had provided treatment services and the tribe did not support any additional services or object to the termination of parental rights

In the present case, the Court of Appeals noted that Cheryl Lee receives Social Security disability benefits for having borderline intelligence and an explosive personality disorder.[34] There was also evidence presented from the tribe that Ms. Lee had a history of mental health disorders and was believed to be suffering from Fetal Alcohol Syndrome.[35] In fact, Cheryl Lee received over six years of services from DHS and the Tribe, but despite these extensive efforts, she was unable to develop the skills necessary to safely parent children.

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[30] *Letitia*, 97 Cal Rptr 2d at 309.
[31] *Letitia*, 97 Cal Rptr 2d at 309.
[32] *Letitia*, 97 Cal Rptr 2d at 309.
[33] *In the Interest of KD*, 155 P3d 634 (Colo 2007).
[34] *Lee*, slip op at 3.
[35] *Lee*, slip op at 4.

In upholding the termination of parental rights under ICWA, the *KD* Court reasoned that a denial of services is not inconsistent with the "active efforts" requirement of the ICWA "if it is clear that past efforts have met with no success."[36] Although the State must make "active efforts" under ICWA, it need not "persist in futile efforts."[37] Application of these principles to Cheryl Lee's conditions is consistent with the Court of Appeals' decision.

As recognized by the *KD* Court, South Dakota reached the same conclusion in the *Interest of J.S.B., Jr.*[38] In *J.S.B., Jr.*, the South Dakota Supreme Court upheld the termination of parental rights under ICWA because, although that state's Department of Social Services had to make active efforts to reunite the child with the father, it was not required to persist in futile efforts. Again *J.S.B., Jr.* contains some similar facts to the present case. In *J.S.B., Jr.*, the South Dakota Department of Social Services had worked with the father repeatedly to try and assist him with his inability to properly parent his son. Although his problem was alcohol abuse and not borderline intelligence and explosive personality disorder as in this case, both parents suffered from serious problems that impacted their ability to properly parent their children. In both *J.S.B., Jr.* and this case, the State social service agencies made numerous but unsuccessful attempts to help the parents overcome these personal issues. In both cases, the parents failed to complete or comply with the services being provided. In both cases, there was expert testimony that if the parent were to gain permanent custody, it would likely result in serious emotional or physical damage to the child. And in both cases, those "active efforts" were ultimately futile in trying to prevent the breakup of these Indian families. The *J.S.B., Jr.*, Court concluded its

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[36] *In re Adoption of Hannah S*, 142 Cal App 4th 988; 48 Cal Rptr 3d 605 (2006).
[37] *People in Interest of J.S.B.* Jr. 691 NW 2d 611, 621 (SD 2005).
[38] *Interest of J.S.B., Jr.*, 691 NW2d 611 (SD 2005).

analysis by stating that "Under ICWA, DSS was bound by law to make 'active efforts' to reunite J.S.B with his father, but it was not required to persist in futile efforts."[39]

The reasoning in other State courts' decisions is compelling: do not require continued active efforts under ICWA when those efforts are clearly futile. On the other hand, to require the continuation of futile efforts, simply to satisfy a perceived requirement that "active efforts" means "contemporaneous efforts," does a disservice to the Indian children and their families that ICWA was specifically designed to protect. Depending on the facts presented in a given case, the State's efforts might be "active" after a delay of two days, two months, two years or more. Since ICWA identifies no particular time frame, it should be left to the trial court judge to determine on a case-by-case basis whether services provided and the State's efforts satisfied the "active efforts" requirement.

In a recent Utah case interpreting the ICWA "active efforts" requirement, there was a four-year gap between the time the State trained a custodial grandfather as a social worker and its 2007 removal of the children from his home (after he abused these children).[40] As a foster care worker (from 1996-2003), the grandfather received specific training on the special needs of children in the child welfare system and the appropriate ways in which those children can be disciplined. Through this training, the grandfather learned the proper methodology for parenting children and had, in fact, taught foster parents those rules. His ability to repeat those methods at trial indicated that his training was not too remote in time to be relevant to the removal of his grandchildren. Furthermore, the children were placed with the grandfather the same year that he retired from the state agency, when these parenting guidelines would have been fresh in his mind. Noting that the state agency actually taught those skills specifically to the grandfather at a

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[39] *People in Interest of J.S.B.* Jr. 691 NW 2d 611, 621 (SD 2005).
[40] *State ex rel CD v State*, 2008 UT App 477; 2008 Utah App LEXIS 478 (12/26/08).

level that qualified him to teach others, the Court concluded that a further offer of services would be futile[41]:

> We therefore hold that the trial court was within its discretion in concluding that further efforts with Grandfather would be futile. Accordingly, we affirm the trial court's determination that further active efforts were not required.

Here, consistent with the analysis of these other jurisdictions, the Court of Appeals in *Lee* determined that requiring DHS and the Tribe to continue active efforts with Cheryl Lee would be futile and neither envisioned nor required by ICWA.

The Court of Appeals concluded that it was clearly and convincingly established that DHS and the tribal agencies made many varied and repeated efforts to provide services to keep this family together. But there was overwhelming evidence to establish her inability to improve her parenting skills or make significant progress toward addressing her problems. Thus, the Court of Appeals noted that "[b]ecause of the intractable nature of Cheryl Lee's inability to learn appropriate parenting techniques, any additional efforts to rehabilitate Cheryl Lee would have been largely futile."[42]

In support of this holding, the Court noted that the Sault Ste. Marie Tribe of Chippewa Indians provided Melissa VanLuven was an expert on Indian welfare as was required by § 1912 (f) of the ICWA. Ms. VanLuven stated that the Tribe expected its parents to provide for their children's needs and also to provide appropriate supervision, discipline, and care for their children. Ms. VanLuven opined that Cheryl Lee's parenting was inconsistent with the typical parenting practice of other tribal parents, and that it was likely that Jaden Lee would suffer serious emotional or physical damage should Cheryl Lee gain his custody. Finally, Ms. VanLuven stated that, as an expert on Indian welfare, she was satisfied that active and reasonable

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[41] *State ex rel CD v State*, 2008 UT App 477; 2008 Utah App LEXIS 478 (12/26/08), at p38.
[42] *Lee*, slip op at 9.

efforts designed to prevent the breakup of Cheryl Lee and Jaden Lee had been provided. Cheryl Lee provided no expert on Indian welfare to contradict this testimony. Appropriate deference should be given to the Sault Ste. Marie Tribe of Chippewa Indians when the Tribe makes determinations based on own Indian welfare expert regarding Ms. Lee's parenting skills, DHS's "active efforts" and the futility of its continuing services.

Therefore, the Court of Appeals in *Lee* incorporated all of these legal principles and should be affirmed.

II. ICWA §1912(f) requires that a termination of parental rights to be based on evidence establishing beyond a reasonable doubt that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. DHS presented evidence from a qualified Indian welfare expert, as well as case workers, showing that allowing Cheryl Lee to gain custody of Jaden Lee would cause the child serious emotional or physical damage and would not be in his best interest. This evidence meets the beyond a reasonable doubt standard even though it is not contemporaneous to the termination proceeding.

A. Standard of Review

Whether the beyond a reasonable doubt standard under ICWA § 1912(f) requires contemporaneous evidence is an issue of first impression and presents a question of law that is reviewed *de novo*.[43]

[43] *Shurlow v Bonthuis,* 456 Mich 730, p 734-735; 576 NW2d 159 (1998).

B. **Analysis**

The analysis applied in the previous issue is applicable to this issue in that, where there is evidence showing that the State made prior "active efforts" to rehabilitate an Indian parent to prevent the breakup of the Indian family involving other children and those efforts were unsuccessful, the state need not offer contemporaneous evidence of active efforts to rehabilitate the parent before terminating parental rights to another child. For the court to terminate parental rights under MCL 712A.19b(3)(i), the State must prove, by clear and convincing evidence, that the parent's rights "to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful." This court has defined this evidentiary standard to mean when it "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.". .[44] In accordance with the requirement under § 1912(f) of the ICWA:[45]

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The State court must apply this federal requirement. In State termination cases involving Indian children, both the federal ICWA standard and the State ground for termination must be proved.[46] The federal ICWA standard has a higher standard of protection for the rights of an Indian parent.[47] Therefore, the determination by the court, based on proof beyond a reasonable

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[44] *Martin v Martin,* 450 Mich 204, 207; 538 NW2d 399 (1995)
[45] 25 USC § 1912(f).
[46] *In re Dougherty*, 236 Mich App 240, 246; 599 NW2d 772 (1999), citing *In re Elliott*, 218 Mich App 196, 209-210; 554 NW2d 32 (1996). *Also see* MCR 3.980(D).
[47] 25 USC § 1921.

doubt, including expert witness testimony that continued custody is likely to result in serious emotional and physical damage to the child is all that is needed and all that the federal ICWA standard requires.[48]

At the same time, courts in other jurisdictions recognize that they can draw reasonable inferences based on the facts presented to the trial court. For instance, a Montana Court stated[49]:

> This Court has repeatedly stated that because it does not have "a crystal ball to look into" to determine whether a parent's conduct is likely to change, **that determination must, to some extent, be based on the parent's past conduct.** ... Here, the District Court received substantial testimony from qualified cultural and other experts upon which it could conclude beyond a reasonable doubt that the prospect of L.G. providing primary care for M.R.G. is likely to subject M.R.G. to serious harm.

If a trial court concludes that a parent's past conduct involving other children is unlikely to change, ICWA does not require a State to provide **contemporaneous** evidence to prove beyond a reasonable doubt that the parent is likely to cause serious emotional or physical damage to a subsequent child. The State is only required to establish evidence beyond a reasonable doubt that the failure to terminate parental rights is likely to cause serious emotional or physical damage to the child to satisfy the requirement of § 1912(f). The trial court need only be satisfied that the beyond a reasonable doubt standard has been met. This standard was met when the tribe presented evidence from an Indian welfare expert, as well as other caseworkers, that reuniting Cheryl Lee and Jaden Lee would cause him emotional and physical harm. Additionally, the determination required under § 1912(d) can be satisfied by the unrefuted evidence that established that the court had already terminated the parent's rights to siblings of the child, due to

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[48] 25 USC § 1912(f).

[49] *In the Matter of M.R.G.*, 97 P3d 1085, 1090 (MT 2004)(citations omitted; emphasis added).

serious and chronic neglect or abuse, and the state's unsuccessful prior attempts to rehabilitate the parent.[50] Such evidence can rise to meet the "beyond a reasonable doubt" standard.

It is the duty of the trial court, as the trier of fact, to weigh the evidence and determine whether the State has met the burden of proving beyond a reasonable doubt that the parent is likely to cause emotional and physical damage to the child.[51] In the *Lee* case, four witnesses testified to the active efforts they made to prevent the breakup of Cheryl Lee's family. They provided remedial and rehabilitative services to her from a variety of agencies over six years. None believed that she had benefited from the services provided. A parent must benefit from services to enable the court to determine whether the parent can properly provide for the child.[52] As for Cheryl Lee, one of the witnesses, a qualified expert as required under § 1912(f) of ICWA, opined that her "parenting was inconsistent with the typical parenting practice of other tribal parents." The expert witness further opined that "Jaden Lee would suffer serious emotional or physical damage should Cheryl Lee gain custody of him."[53] From this evidence the trial court properly determined that the state met its burden.

The *Lee* panel properly applied the anticipatory neglect doctrine in viewing Cheryl Lee's past behavior as a strong indicator of her future parental performance. Moreover, it properly concluded that the trial court did not err, based on the testimony of the expert witness along with that of other witnesses who worked with Cheryl Lee over six years, in the determination that it was likely Jaden Lee would suffer serious emotional or physical damage should Cheryl Lee gain

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[50] MCL 712A.19b(3)(i). See also MCL 722.638(1)(b); *In re AH*, 245 Mich App 77, 84-85; 627 NW2d 33 (2001).
[51] *Rasheed v Chrysler Corp.*, 445 Mich 109, 121-122; 517 NW2d 19 (1994); *Gorelick v Dep't of State Hwy*, 127 Mich App 324, 333; 339 NW2d 635 (1983).
[52] *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005).
[53] *In re Lee*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2008 (Docket No. 283038), citing *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001).

custody of him. Ms. Lee did not refute this testimony through her own expert. Although not determinative, how Ms. Lee treated her other children is probative of how she will treat Jaden Lee.[54] Once the State and the Tribe introduced this evidence, Ms. Lee should have offered evidence from a qualified Indian welfare expert to show that she could properly care for Jaden Lee. Having failed to do so, the lower courts properly concluded that the State and the Tribe had met their burden.[55]

The ICWA is intended to protect the Indian child's best interest and promote stability within the Indian family and tribe. The higher ICWA standards imposed by Congress are sufficient to carry out this intent. Where it has been repeatedly shown by clear and convincing evidence that Cheryl Lee's parental rights have been terminated to other children as a result of her chronic neglect, the state should not be required to make "recent active efforts" to reunite her to Jaden, or to produce "contemporaneous evidence" to prove beyond a reasonable doubt that she is likely to cause emotional or physical damage to him before terminating her parental rights. Such requirements would not protect Jaden's best interests or promote stability between that him and Cheryl Lee, but rather would delay the inevitable while creating an opportunity for Cheryl Lee to actually harm Jaden. Under the current ICWA standards, Congress left it to the State trial court to determine for each individual case what constitutes active efforts and evidence beyond a reasonable doubt. If additional standards are necessary to carry out the intent of the ICWA, then they should be imposed by Congress on all state courts.

This Court should consider only the language Congress included in ICWA § 1912(f) without reading anything into it that is not intended by Congress.[56] It is clear that Congress did

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[54] *In re AH*, 245 Mich App at 84.
[55] *In re Pasco,* 150 Mich App 816, 821-822; 389 NW2d 188 (1986).
[56] *House Speaker v State Administrative Board,* 441 Mich at 567.

not express that evidence beyond a reasonable doubt requires a showing of likely damage to a child by the parent at the same time of the termination proceeding involving that child. Emotional or physical damage to the child by the parent, particularly in a case like *Lee*, could be proven beyond a reasonable doubt based on evidence of the parent's treatment of other children.[57] Thus, in termination of parental rights proceedings involving an Indian child, to satisfy § 1912(f), the State must present evidence beyond a reasonable doubt, including the testimony of a qualified expert on Indian welfare, to establish that continued custody by the parent is likely to result in serious emotional and physical damage to the child. This standard protects the Indian child's best interest and promotes stability within the Indian family and tribe. ICWA § 1912(f) does not require that the evidence on which the trial court relies must be contemporaneous with its determination.

Consequently, the Court of Appeals properly determined that it had been established beyond a reasonable doubt that allowing Cheryl Lee to gain custody of Jaden Lee would cause him emotional or physical harm. Further, that evidence was not required to be contemporaneous with the termination proceeding to meet the requirements of ICWA.

[57] *In re AH*, 245 Mich App at 84.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated in this brief, the Attorney General, as *amicus curiae* respectfully requests that this Honorable Court rule:

1. The term "active efforts" in 25 USC § 1912(d) does not, as a matter of law, require a showing that there have been recent rehabilitative efforts designed to prevent the breakup of the Indian family when those continued services would be futile; each case should be determined on a case-by-case basis;

2. The "beyond a reasonable doubt" standard of 25 USC § 1912(f) requires evidence from an Indian welfare expert that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage. ICWA does not require, as a matter of law, that such evidence must be contemporaneous to the termination hearing to meet the ICWA standard.

Respectfully submitted,

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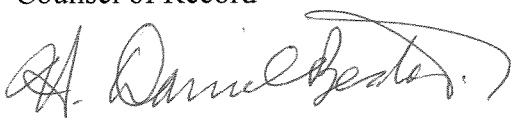

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